

DEC 21 2011

Part of  
Public Record

DEC 19 2011

Before the  
Surface Transportation Board  
Finance Docket No. 35527

23 (54)

**ERIC STROHMEYER AND JAMES RIFFIN -  
§10901 ACQUISITION AND OPERATION APPLICATION-  
VALSTIR INDUSTRIAL TRACK - IN MIDDLESEX AND UNION COUNTIES, NJ**

**PETITION TO REOPEN**

1. Eric Strohmeier, one of the Applicants in the above entitled proceeding ("Strohmeier"), herewith, pursuant to 49 CFR 1115.4, files this Petition to Reopen the Board's October 20, 2011 decision in the above entitled proceeding, and in support thereof states:

2. On October 20, 2011, the Board rejected Applicants' Acquisition and Operation Application. In the Application, the Applicants sought to obtain authority to acquire the Valstir Industrial Track, located in Middlesex and Union Counties, NJ, and then to operate the Valstir Industrial Track as a line of railroad. In their Application, the Applicants expressly sought to limit their common carrier obligations to carrying non-toxic inhalation hazard ("TIH") materials.

3. The sole reason the Board rejected the Applicants Application, was due to the Applicants limiting their common carrier obligations to non-TIH material. Op. p. 2. For its authority, the Board cited *BNSF Ry - Petition for Declaratory Order*, FD 35164, served December 2, 2010, op. at 6, ("BNSF") which quoted a portion of *Union Pacific R.R. - Petition for Declaratory Order*, FD 35219, served June 11, 2009, op. at 3-4 ("UP").

**MATERIAL ERROR**

4. Strohmeier argues that the Board's decision contained material error, that is, that the Board's finding that an applicant attempting to become a common carrier must agree to carry TIH materials, is wrong as a matter of law.

5. The BNSF and UP cases both involved **existing** common carriers, who never limited their obligation to carry goods.

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TRANSPORTATION BOARD**

6. Strohmeier and James Riffin ("**Applicants**"), presently are not common carriers with respect to the Valstir Industrial Track.

7. One seeking to become a common carrier, must identify which of the 'king's ways' over which they seek to be a common carrier, and must identify the type of goods they seek to transport. Permission from the sovereign was required, due to the applicant's desire to use the 'king's ways.' The reasoning was that since the 'ways' belonged to the sovereign, permission had to be obtained from the sovereign to use the sovereign's way.

8. Historically, common carriers have been permitted to delineate the goods they wish to carry for hire. Even when the common carrier has an obligation to carry specific goods, the common carrier was obligated to carry only those goods which the carrier had the ability to carry. If the carrier had grounds to not carry goods it normally carried, the carrier was relieved of its obligation to carry such goods so long as it refused to accept the goods. Once the carrier accepted goods, it was obligated to deliver the goods to the intended destination. *Hannibal Railroad Co. v. Swift*, 12 Wall. (79 U.S.) 262 at 270 - 273, 20 L.Ed. 423, 428 - 429 (1870); *Montgomery Ward & Co. v. Northern Pacific Term. Co.*, 128 F.Supp. 475, 491 (D.Or. 1953).

9. There have been numerous times when the Interstate Commerce Commission and the Board have limited a carrier's obligation to carry goods to specific goods, and have relieved a carrier of the obligation to carry specific goods. A carrier who desires to receive authority for trackage rights over specific lines, often is limited in what the carrier can carry. Sometimes the carrier receives authority to carry only one commodity, such as aggregates. Many commodities have been exempted from regulation. A carrier has no obligation to carry exempt commodities. A barge line may seek authority to carry only one commodity. Once authority is granted, the barge line is obligated to carry only that commodity that it sought authority to carry.

10. In the BNSF case, Ed Kessler objected to BNSF transporting hazardous materials over the Packingtown Lead, which traversed residential areas. Mr. Kessler argued that BNSF's environmental report contained in its abandonment petition for the Chickasha Line, was false and misleading, since BNSF failed to disclose that it might carry hazardous material over the Packingtown Lead once the Chickasha Line was abandoned. The Board, in rejecting Mr. Kessler's Petition to Reopen the abandonment proceeding, made the following statement, which included an excerpt from the UP case:

"Railroads have not only a right but a statutory common carrier obligation to transport hazardous materials 'where the appropriate agencies have promulgated comprehensive safety regulations.' " Slip op. at 6.

11. The issue in the BNSF case was whether BNSF's environmental statement was false and misleading. The above quote was dicta at best, and certainly was not the result of an informed decision addressing the issue of whether BNSF had an obligation to carry hazardous materials.

12. In the UP case, UP was seeking an opinion from the Board as to whether UP had an obligation to quote rates to US Magnesium for carrying chlorine. The Board held that UP had failed to prove that carrying chlorine was unsafe, and without such proof, UP was obligated to quote a rate.

13. In both the UP and BNSF case, and in the cases cited in the UP case, the carriers were existing carriers **who had never limited their obligation to carry goods**. In their original petitions seeking common carrier authority, the carriers sought to carry **all goods tendered**. Only many years after the carriers received their common carrier certificates, did they attempt to limit what they carried. In holding that the carriers could not refuse to carry what they had originally agreed to carry, the ICC held that the carriers could limit what they carried only upon a showing that such carriage was unsafe. Such a ruling makes sense. If it was 'safe' to carry hazardous goods when the carrier received its certificate, then the carrier was obligated to show changed circumstances (that it now was 'unsafe') prior to being relieved of its obligation to carry hazardous goods. The ICC held that because safety regulations had been issued, carrying hazardous goods must be 'reasonably' safe, providing the safety regulations are followed. If carrying hazardous goods was unsafe, and could not be carried safely, then the regulations would prohibit carrying such unsafe goods.

14. In this proceeding, the Applicants have never agreed to carry all goods on the Valstir Industrial Track. They are seeking to carrying a select group of goods, much like a certificate issued to an entity seeking trackage rights to carry specified goods. Since they have never agreed to carry all goods, they need not show 'changed circumstances' to justify being relieved of the

obligations they previously had committed to be bound by. Likewise, they are similar to a barge company seeking authority to carry select goods, not all goods.

15. Strohmeyer would point out that freight railroads no longer are obligated to carry passengers, nor their baggage. To Strohmeyer's knowledge, neither passengers and nor their baggage have been declared 'exempt' commodities.

16. WHEREFORE, for the foregoing reasons, Strohmeyer would ask that the Board reopen this proceeding, then permit the Applicants to address the narrow issue of whether a **non-carrier** must agree to carry all non-exempt goods before being issued a certificate of public convenience and necessity, and to permit the Board to cite specific cases where **non-carriers** have been obligated to carry all goods offered, as a condition of being granted a certificate of convenience and necessity.

Respectfully,

*E. Strohmeyer by J. Riffin*  
*W/ PERMISSION*  
Eric Strohmeyer  
81 Century Lane  
Watchung, NJ 07069  
(908) 361-2435

#### CERTIFICATE OF SERVICE

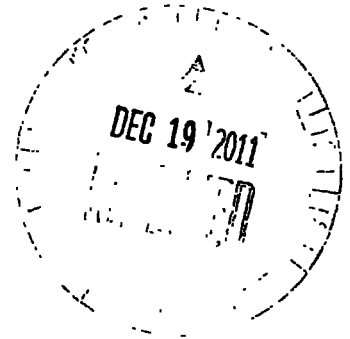
I hereby certify that on the 19<sup>th</sup> day of December, 2011, a copy of the foregoing Petition to Reopen was mailed via first class mail, postage prepaid, to James Riffin and to Robert Jenkins III, Counsel for Conrail, Mayer Brown, 1999 K Street NW, Washington, DC 20006-1101.

*E. Strohmeyer by J. Riffin*  
*W/ PERMISSION*  
Eric Strohmeyer

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UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT



**JAMES RIFFIN**

**Petitioner**

**Case No.:**

**11-1480**

**V.**

**SURFACE TRANSPORTATION**

**BOARD**

**Respondent**

**FD No. 35527**

**Dunellen, NJ**

\* \* \* \* \*

**PETITION FOR REVIEW OF  
SURFACE TRANSPORTATION BOARD  
DECISION SERVED ON OCTOBER 20, 2011**

Notice is hereby given this 19<sup>th</sup> day of December, 2011, that Petitioner, James Riffin, herewith petitions the United States Court of Appeals for the District of Columbia Circuit for review of the Decision of the Respondent, Surface Transportation Board, entered (Served) on October 20, 2011, in the case entitled: *Eric Strohmeier and James Riffin – Acquisition and Operation Application – Valstir Industrial Track in Middlesex and Union Counties, NJ*, STB Finance Docket No. 35527, STB served October 20, 2011.

A copy of the STB's decision is appended hereto.

James Riffin, *Pro Se*  
1941 Greenspring Drive  
Timonium, MD 21093  
(443) 414-6210

**PETITIONERS' DISCLOSURE OF  
AFFILIATIONS AND FINANCIAL INTEREST**

Your Petitioner is not a publicly held entity, nor does he have a parent corporation. He has a 100 % ownership interest. No other publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation. Your Petitioner is not a trade association. This case did not arise out of a bankruptcy proceeding.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19<sup>th</sup> day of December, 2011, a copy of the foregoing Petition for Review, was served by first class mail, postage prepaid, upon the parties of record noted below.

  
James Riffin

**Ellen D. Hanson**  
General Counsel  
STB  
395 E St. S.W.  
Washington, D.C. 20423

**John Fonte**  
Appellate Section Anti-trust Division  
Dept. of Justice  
950 Pennsylvania Ave. NW  
Washington, D.C. 20530-0001

**Robert Jenkins III**  
Mayer Brown  
1999 K Street NW  
Washington, DC 20006-1101

**Eric Strohmeyer**  
81 Century Lane  
Watchung, NJ 07069